

DEPARTMENT OF STATE REVENUE

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LETTER OF FINDINGS NUMBER 92-0086 ST

Sales and Use Tax

For The Periods: December 31, 1988, 1989 and 1990

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Sales and Use Tax - Capital Assets

Authority: IC 6-2.5-5-3.

The taxpayer protested the assessment of sales or use tax on certain equipment that the taxpayer alleges is used to produce paved roads.

II. Sales and Use Tax - Leased Property

Authority: IC 6-2.5-4-10

The taxpayer protested the assessment of tax on the purchase of services treated as lease contracts.

III. Sales and Use Tax - Public Transportation

Authority: IC 6-2.5-5-27.

The taxpayer protested the imposition of tax on purchases used in providing public transportation.

IV. Negligence Penalty - Imposition

Authority: IC 6-8.1-10-2.1(e); 45 IAC 15-11-2(c)

The taxpayer protested the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

The taxpayer operates a trucking and paving company. The taxpayer lays asphalt, plows snow and hauls gravel and dirt for itself and others. The taxpayer failed to pay sales or use tax on certain capital assets, repair parts and supplies and rentals.

I. Use Tax - Capital Assets

DISCUSSION

The taxpayer alleges that a paver, grader, distributor, crane and similar equipment are used in direct production of paved roads and are exempt from Indiana use tax. Indiana use tax is imposed under IC 6-2.5-3-2(a), which provides the following:

(a) An excise tax, known as the use tax, is imposed upon the storage, use or consumption of tangible personal property in Indiana, if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

Under 6-2.5-3-4(a)(2), "the property is exempt if acquired in a transaction that is wholly or partially exempt... under any part of IC 6-2.5-5, except IC 6-2.5-5-24(b), and the property is being used, stored or consumed for the purpose for which it was exempted."

Under IC 6-2.5-5-3(b),

Transactions involving manufacturing machinery, tools, and equipment are exempt from the state gross retail tax if the person acquiring the property acquires it for his direct use in the direct production... of other tangible personal property.

It is agreed that paving considered to be manufacturing and qualifies for the exemption under IC 6-2.5-5-3(b). This exemption applies only to machinery, tools and equipment used in direct production of other tangible personal property. Therefore, not all of the equipment used to pave roads would be exempt from taxation. The department has determined that the paver, which was assessed by the auditor is used in direct production of the paved road and is exempt. The remaining equipment assessed by the auditor is not used in direct production and is not exempt under IC 6-2.5-5-3(b).

FINDING

The taxpayer's protest is partially sustained. The "Paver" is exempt from taxation, because it is considered used in direct production. The remaining equipment is taxable.

II. Sales and Use Tax - Leased Property

The auditor assessed tax on the invoices which specified equipment rental. The taxpayer alleges that the invoices were incorrectly identified subcontracting services not equipment rental. The taxpayer alleges that it did not employ the operator of the equipment, had no right to direct movement of the equipment, no obligation to pay for costs or

repairs of the equipment, and no obligation to pay insurance and license fees on the equipment. The taxpayer has not provided any evidence that what it alleges took place did in fact take place. The only evidence provided was the invoices which stated that the payment was for equipment rental.

FINDINGS

The taxpayer's protest is denied.

III. Sales and Use Tax - Public Transportation

The taxpayer alleges that the purchase of truck repair parts, and supplies is exempt under IC 6-2.5-5-27. The auditor stated that the taxpayer and the auditor agreed that the taxpayer used the trucks for nonexempt purposes. The auditor stated that the taxpayer hauls its own equipment approximately ten percent (10%) of the time. Therefore, the auditor permitted the taxpayer to purchase 90% of the truck parts, and supplies exempt. The taxpayer alleges that the remainder of the parts and supplies should also be exempt, because the products the auditor alleges belong to the taxpayer are purchased by the taxpayer as a convenience to its customer. The customer calls the taxpayer and places the order. The taxpayer in turn calls its supplier and orders the product, picks up the product and delivers the product to its customer. The taxpayer owns the product and hauls the product to its customers.

IC 6-2.5-5-27 the public transportation exemption provides:

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

The taxpayer agreed that the equipment is used ninety percent (90%) of the time for public transportation. Therefore, agreeing that it is used in other capacities ten percent (10%) of the time. The auditor allowed the taxpayer a ninety percent (90%) exemption on purchases of truck repair parts and supplies.

FINDINGS

The taxpayer's protest is denied.

IV. Negligence Penalty - Imposition

DISCUSSION

The negligence penalty imposed under IC 6-8.1-10-2.1(e) may be waived by the Department where reasonable cause for the deficiency has been shown by the taxpayer. Specifically:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-2 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. 45 IAC 15-11-2(c).

The taxpayer has failed to establish reasonable cause for the deficiency remaining after the adjustments required by this letter.

FINDING

The taxpayer's protest is denied.

CONCLUSION

The taxpayer's protest is partially sustained. Issue one, the paver is exempt from taxation and taxpayer is partially sustained. Issue two is denied. Issue three is denied. Issue four is denied.